Appraising the regulatory framework for insider trading in mergers and acquisitions in South Africa

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SUMMARY

The prevalence of mergers and acquisitions (M&A) leads to increased insider trading. This negatively affects companies' chances of generating more capital and the liquidity of financial markets, thereby affecting the country's economy due to a lack of investor confidence. Insider trading activity is more likely in M&A because it involves many insiders from the target and acquiring companies. According to the Financial Markets Act, the term "insider" would encompass officers, executives, board members, shareholders or employees directly involved in M&A, and persons such as negotiators who come into possession of the information intentionally or unintentionally during their duties. Inside information is sometimes leaked by financial and legal advisors, investment bankers, and business consultants who are retained by one of the parties to the transaction to assist in due diligence and complex negotiations. South Africa is one of the leading economies in the emerging financial markets. Therefore, effective regulation of insider trading in South Africa will promote stable and reliable economic growth through investment. This article addresses the following: (a) Is South Africa's current legislative and regulatory framework adequate to curb the problem of insider trading in M&A? (b) Are there any identifiable strengths and weaknesses in the legislation of insider trading in M&A in South Africa? (c) Is there a need to enact laws specifically dealing with insider trading in mergers and acquisitions? (d) Are there any useful lessons South Africa can learn from the approach adopted in the United States? (e) To the extent that the South African regulatory framework on insider trading is inadequate, how can South Africa enhance its legal framework in combating insider trading in mergers and acquisitions?

1 Introduction

Mergers and acquisitions (M&A) are significant in South Africa's economy. This can be understood from various perspectives: First, M&A can stimulate economic growth by facilitating the merging of companies.[1] Second, M&A can create new job opportunities and preserve existing ones.[2] Third, M&A can bring in foreign capital,

1 Ndadza *Beneficiaries of Mergers and Acquisitions in South Africa* (Master of Management in Finance and Investment dissertation 2014 University of Witwatersrand) 13.

2 As above.

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technology, and expertise.[3]This may also contribute to infrastructure improvements and industry transformation. Fourth, M&A can enable companies to diversify their operations and reduce the risks of depending on a single market or product.[4] Moreover, M&A can attract more investment in the financial markets.[5]

M&A may offer several advantages, but they also come with several disadvantages. Some common drawbacks include but are not limited to cultural clashes. When two companies with different cultures merge, it can lead to conflicts among employees and can ultimately affect the productivity of the merged company. Further, a merged company may face integration challenges. Combining systems, processes, and technologies from two different companies can be time-consuming, leading to operational disruptions and inefficiencies. Further, M&A transactions may lead to the loss of valuable employees. The uncertainty around such transactions may lead to the loss of key talent and institutional knowledge. Customers and suppliers may also become reluctant to cooperate with the newly merged company, which may hinder the progress of the company.

Insider trading in the context of M&A refers to trading in securities based on material non-public information related to a pending M&A deal.[6] This unlawful activity involves persons accessing inside information about an impending merger or acquisition and using that information to buy or sell securities for personal gain. Insider trading can have a negative impact on South Africa's financial markets. It can erode market integrity & fairness by allowing those with privileged access to material non-public information to gain an unfair advantage over ordinary investors.[7] This affects investor's confidence; they may be less inclined to participate in financial markets if they believe that the market is rigged in favour of insiders.[8] Insider trading can also distort market efficiency by introducing inaccurate price signals.[9] This happens when an insider trades based on material non-public information, the securities prices may not accurately reflect the true fundamentals of a company. Insider trading can also impede a fair and transparent process, which is important for companies that want to raise capital by selling and buying

3 As above.
4 Bhimani, Ncube and Sivabalan "Managing Risk in Mergers and Acquisitions Activity: Beyond Good and Bad Management" 2015 *Managerial Auditing Journal* 162.
5 Gaughan *Mergers and Acquisitions and Corporate Restructurings* 5 (2011) 105; Ndadza 10.
6 See s 78 of the Financial Markets Act 19 of 2012; Oluwabiyi 2014 *Frontiers of Legal Research* 2.
7 As above.
8 Chitimira, Samodien and Mongalo *Principles of Market Abuse Regulation: A Comparative South African Perspective* (2018) 17.
9 Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM dissertation 2008 University of Fort Hare) 1.

securities.[10] This may deter potential investors from participating in initial public offerings or buying newly issued securities.[11] However, some scholars have argued that insider trading should not be outlawed.[12] In broad terms, the proponents of insider trading argued that insider trading improves market efficiency. They argued that insider trading speeds up the accurate pricing of securities, thus enhancing the economy's allocation of capital investments and minimising the volatility of security prices. They also argued that insider trading is a justifiable and efficient way of remunerating managers for having unearthed the inside information. The argument is that insider trading benefits the company and society because it incentivises innovation. Be that as it may, South Africa has established regulatory bodies such as the Financial Sector Conduct Authority (FSCA) and the Johannesburg Stock Exchange (JSE) and legal frameworks such as the Financial Markets Act 19 of 2012 (FMA) to prevent and penalise insider trading offenders.

This article aims to demonstrate that insider trading in M&A is a serious problem that requires appropriate and specific regulation. The risks that insider trading in M&A pose to the capital markets, companies and innocent investors will be highlighted. Further, the article emphasises the importance of enacting stringent rules to curb insider trading in M&A in South Africa. An enhanced legal framework to deal with insider trading to achieve market integrity and efficiency in M&A is advocated for through this article. This is to promote the transparency and integrity of the parties involved in M&A.

2 Understanding Insider Trading in South Africa

In South Africa, insider trading is not specifically defined by the FMA; however, it can be defined as purchasing or selling securities using material non-public information that is not yet known to the general investing public.[13] The FMA, therefore, identifies five key offences that constitute insider trading. The first is dealing in securities based on inside information.[14] This involves trading in securities based on material non-public information about a company.[15] Tipping occurs when an insider discloses inside information to others, who may then use that information to trade.[16]

Both parties, the tipper and the tippee, can be held liable for insider trading. Another form of insider trading is encouraging or discouraging

10 Oluwabiyi 2014 *Frontiers of Legal Research* 3.
11 Chitimira, Samodien and Mongalo (2018) 4.
12 Cassim, Cassim, Cassim, Jooste, Shev, & Yeats *Law of Business Structures* 2 (2021) 612.
13 Chitimira, Samodien and Mongalo (2018) 17.
14 See s 78(1)(a) Financial Markets Act.
15 Osode "Defending the Regulation of Insider Trading on Basis of Sound Legal Orthodoxy: The Fiduciary Obligations Theory" 2004 *Okpaluba Law in CSAC* 303.
16 See s 78(3)(a) Financial Markets Act.

others from dealing in securities while possessing inside information,[17] as this can influence market activity in an unethical manner. Additionally, dealing on behalf of an insider[18] involves persons who knowingly trade on inside information on behalf of another person; such persons can also be held liable for insider trading.[19]Lastly, the Improper disclosure of inside information by an insider to another person leads to insider trading violations.[20] These provisions collectively aim to ensure market fairness and prevent the misuse of privileged information for personal gain.

In South Africa, insider trading is considered unethical and harmful to market integrity for various reasons. It allows persons with access to material non-public information regarding a company to gain an unfair advantage in the financial markets, such as M&A, over other investors without such information.[21] Additionally, it encourages corporate misconduct among company officers, employees and directors.[22] Furthermore, the presence of insider trading can deter domestic and foreign investment.[23] Investors may be reluctant to invest in markets that are perceived to have a risk of insider trading. Overall, insider trading undermines the fundamental principle of market integrity,[24] which is the belief that all participants have equal access to information and opportunities.

In a nutshell, insider trading is considered unethical because it undermines the principles of fairness, transparency, and equal opportunity in financial markets.[25] It can lead to economic inefficiencies, erode investor confidence, and harm the financial system's integrity.[26] Therefore, stringent laws must be implemented to combat insider trading and preserve market integrity. Regulating insider trading can promote investors' confidence in the financial markets, which may also boost South Africa's economic growth and development.[27] Insider trading laws and regulations uphold legal and ethical standards, which may help establish a framework for ethical conduct in the financial markets.[28]

17 See s 78(5) Financial Markets Act.
18 See s 78(2)(a) Financial Markets Act.
19 As above.
20 See s 78(4)(a) Financial Markets Act.
21 As above.
22 Bhattacharya "Insider Trading Controversies: A Literature Review" 2014 *Annual Review of Financial Economics* 386.
23 As above.
24 Packies *The Market Abuse Control Legislative Regime of South Africa, Nigeria, and the United Kingdom – An Approach to Regulation and Monitoring in Relation to Certain Aspects of the Financial Markets of South Africa* (LLM dissertation 2015 University of Western Cape) 7-8.
25 Mitchell and Kodongo 2016 *African Finance Journal* 3.
26 As above.
27 Chitimira (LLM) 7.
28 Botha "The Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *South African Mercantile Law Journal* 239-263.

3 Mergers and Acquisitions in South Africa in terms of the Companies Act 2008

The preamble of the Companies Act 71 of 2008 states that one of the Act's goals is to facilitate fair and effective corporate mergers, acquisitions and amalgamations.[29] M&A are also known as fundamental transactions or takeover transactions.[30] Regulating M&A in terms of the Companies Act aims to create transparent, efficient and simple procedures.[31] As with insider trading, the provisions on M&A under the Companies Act only apply to companies listed on a regulated market: public companies, state-owned or private companies (where the memorandum of incorporation states so). M&A are adaptive mechanisms through which companies can grow and increase speed to financial markets and readjust labour in rigid labour market structures.[32]

When including takeover provisions in the Companies Act, the legislature realised that a regulated takeover market could create wealth for society by improving the allocation of productive resources for insider trading.[33] Moreover, an unregulated corporate control market increases firms' capital costs by allowing inefficient control transfers, thus failing to allocate efficiency.[34] M&A are regarded as a corporate search for value creation and maximising shareholder value, including growth, asset redeployment and market power increase.[35] Some reasons for M&A include expanding the business, which may provide synergistic benefits to the acquirer and enable a company to move into other business and financial factors.[36] However, M&A are viewed as negatively impacting the corporate welfare as insiders place their interest above that of the corporation, hence committing insider trading.[37] Thus, the Companies Act saw the need to regulate mergers and acquisitions.

In terms of the Companies Act,[38] fundamental transactions are regulated to ensure the marketplace's integrity and fairness to regulated company shareholders. It also prevents actions by a regulated company designed to impede, frustrate or defeat an offer or the making of fair and informed decisions by the shareholders.[39] Therefore, M&A must be

29 See Preamble of the Companies Act; see also Phakeng "Regulation of Mergers and Acquisitions in terms of the South African Companies Act 71 of 2008: An Overview" 2020 *BRICS Law Journal* 90-118.
30 See ss 112, 113, and 117 Companies Act; see also S 89 of Companies Regulations of 2010.
31 See s 113 Companies Act; see Phakeng 2020 *BRICS Law Journal* 91.
32 Ndadza 13.
33 As above.
34 Phakeng 2020 *BRICS Law Journa*l 94; See also Mabasa *Value Creation through Mergers and Acquisitions in South Africa* (Master of Management in Finance and Investment dissertation 2019 University of Witwatersrand) 5.
35 Bhimani, *Ncube and Sivabalan*2015 *Managerial Auditing Journal* 162.
36 Gaughan (2011) 14; see also Ndadza 10.
37 As above.
38 See s 119 Companies Act. See also Phakeng 2020 *BRICS Law Journal* 94.
39 As above.

properly disclosed. This keeps shareholders of a regulated company informed on any activity in the securities and shares of a company, and it establishes the parties looking to acquire control of the company.[40]

In accordance with the Companies Act,[41] during M&A negotiations, insiders must not enter into agreements with relevant shareholders. Insiders—defined for the purpose of this article as parties involved in the transaction—are prohibited from engaging in or arranging deals involving the securities or shares of the target company. If benefits are attached to a transaction that will not extend to all shareholders, shareholders from the target company must not sell any shares unless the Takeover Regulation Panel has consented in advance to that sale. The person selling those securities or shares must give at least 24-hour notice to the public that sales of that nature might be made according to the Takeover Regulations.[42] This disclosure principle assists in preventing insider trading, therefore, it is of paramount importance.

The principle of disclosure in M&A underpins section 121 of the Companies Act, which requires that any party intending to make an offer must first obtain a compliance certificate from the Takeover Regulation Panel.[43] This will ensure that the Takeover Regulation Panel can investigate and review the mergers and acquisitions. Furthermore, a person acquiring securities must notify a regulated company in the prescribed manner within three business days of the acquisition.[44] A regulated company that has received a notice in terms of section 122(1) of the Companies Act must file a copy with the Takeover Regulation Panel and must announce to the rest of the shareholders informing them about the acquisition unless the transaction was of less than one per cent.

Historical events have played a significant role in shaping insider trading regulation in South Africa. Several notable events have highlighted the potential occurrence of insider trading, leading to the development and enhancement of regulations to curb it. Some key historical events that have influenced the need to regulate insider trading in South Africa include the Steinhoff International Holdings scandal, which involved accounting irregularities and financial misstatements at Steinhoff International Holdings, a multinational retail conglomerate.[45]

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40 Mashabane "Mergers and Takeovers under the Companies Act 71 of 2008" 2011 *DR* 30.

41 See s 127 Companies Act; see also Magubane "Public Mergers and Acquisitions in South Africa: Overview" 2020 *ENSAfrica* 8.

42 See ss 95, 98, and 100 Companies Act; JSE Listing Requirements 2007. https://www.jse.co.za/regulation/markets-regulation/market-regulation (last accessed 2021-06-29); see also Magubane 2020 *ENSAfrica* 8.

43 Mashabane 2011 *DR* 30.

44 See s 122(1) Companies Act; see also Mashabane 2011 DR 30.

45 Malan "The Steinhoff scandal: Why due diligence alerts matter" 2013 https://www.stellenboschbusiness.ac.za/management-review/news/2020-12-13-steinhoff-scandal-why-due-diligence-alerts-matter (last accessed 2023-10-29). See also Hugo "The Steinhoff Corporate scandal and the

This resulted in a drop in the company's securities prices.[46] As a result, concerns were raised about corporate governance and transparency in South African companies and financial markets.[47] Another notable event is the *Fidentia* scandal, which emerged in the mid-2000s and involved the misappropriation of funds within the Fidentia Group, a financial services company.[48] This prompted discussions about the regulation of financial markets in South Africa.

These scandals, among others, have highlighted the importance of regulating corporate misconduct such as insider trading. They have contributed to the need for strengthening regulations and enforcement of insider trading laws.

4 Insider Trading Prohibitions

In the context of mergers and acquisitions, insiders[49] are subject to specific prohibitions and restrictions to prevent insider trading and ensure fairness and transparency in the M&A process. Such prohibitions include trading blackout periods, where insiders cannot purchase or sell their company's securities during certain blackout periods.[50] These periods are initiated once M&A negotiations become material non-public information. This is to ensure that insiders do not take advantage of the insider information they have. Insiders are also required to promptly disclose their ownership of securities and any changes in their holdings to the FSCA and to the company.[51] In addition, insiders involved in M&A negotiations may be required to sign confidentiality agreements that prohibit them from disclosing any material non-public information related to the merger and acquisitions. Directors and officers owe a fiduciary duty to their company, including the duty of due diligence and duty of care to act in good faith and have proper purpose in the best interest of the company.[52] In the context of mergers and acquisitions, these duties require insiders to act in the company's best interest.

protection of investors who purchased shares on the secondary market" 2022 https://www.scielo.org.za/scielo.php?script = sci_arttext&pid = S1727-37812022000100058 (last accessed 2023-10-29).

46 As above.

47 As above.

48 Davis "The disgraced Fidentia boss and his unlikely friends" 2013 https://www.ru.ac.za/perspective/2013archive/thedisgracedfidentiabossandhisunlikelyfriends.html#: ~ :text = As % 20the % 20former % 20CEO % 20of,scandals % 20in % 20South % 20Africa's % 20history. (last accessed 2023-10-29).

49 Typically include officers, directors, employees of the involved companies.

50 See ss 95, 98, and 100 Companies Act; see also JSE "Market Regulation" 2019 https://www.jse.co.za/regulation/markets-regulation/market-regulation (last accessed 2021-06-28); see also Magubane 2020 *ENSAfrica* 8.

51 See par 3.4 of JSE Listing Requirements; see also JSE *Insider Trading Booklet (2): Insider Trading and other market abuses* (including effective management of price sensitive information) 2016 8; see also Mitchell and Kodongo 2016 *AFJ* 1-19.

52 See s 76(3) Companies Act.; see also Davis *Companies and Other Business Structures* (2021) 195.

Furthermore, insiders who have a direct financial interest in the outcome of a merger and acquisition transaction may be required to recuse themselves from participating in the decision-making process or voting on the transaction to avoid conflicts of interest.[53] Regulatory bodies such as the FSCA and the JSE monitor insider trading activities during M&A transactions, and they have the authority to investigate and take legal action against persons suspected of violating insider trading laws and regulations.[54] Selective disclosure rules are also applicable to insiders in the context of mergers and acquisitions. Insiders are prohibited from selectively disclosing inside information to specific persons. Rather, material non-public information should be disclosed publicly through regulatory filings or Stock Exchange News Service (SENS).[55]

In the context of mergers and acquisitions, insider trading refers to trading in securities of a company involved in the transaction based on material non-public information about the M&A deal.[56] Several instances constitute insider trading in mergers and acquisitions. Such instances include purchasing securities of a company involved in an M&A deal right before a public announcement, with knowledge of the impending merger or acquisition.[57] Inversely, selling securities of a company before a negative public announcement, whilst aware of the pending merger, is expected to have a negative impact on the company's securities price.[58] Another instance is when an insider borrows and sells securities of a target company, intending to buy the securities at a lower price after the announcement, whilst aware that the acquisition is about to be announced.[59] Additionally, an insider may disclose material non-public information about an upcoming M&A to a friend, family member, or acquaintance, who then uses that information to buy or sell securities to avoid loss or to gain profit from such trading.[60] However, to avoid legal repercussions and maintain market integrity, persons with access to inside information should refrain from disclosing or trading on that information until it has been publicly announced.

53 As above.
54 See s 58 of the Financial Sector Regulation Act 9 of 2017; see also par 3.65 of JSE Listing Requirements; see also Davids and Kitcat "Mergers and Acquisitions Laws and Regulations South Africa 2022" 202 https://iclg.com/practice-areas/mergers-and-acquisitions-laws-and-regulations/south-africa (last accessed 2021-08-18).
55 See paras 3, 3.5 of the JSE Listing Requirements; see also JSE *Insider Trading Booklet (2): Insider Trading and other market abuses (including effective management of price sensitive information)* 2016 9.
56 See s 78 Financial Markets Act.
57 As above.
58 As above.
59 This is also known as "short-selling".
60 As above.

In South Africa, penalties for insider trading can be substantial and may include both criminal and civil consequences. Criminal sanctions for insider trading require guilt to be proven beyond a reasonable doubt.[61] The contravention of section 78 of the FMA attracts a fine of not more than R50 million or imprisonment of not more than ten years or both. This is the maximum penalty for insider trading under criminal liability.[62] The FMA provides that the FSCA can issue civil summons against an alleged insider trader for the profit made or loss avoided due to the transactions subject to insider trading and a penalty of one million and three times such an amount.[63] Moreover, these penalties can also be recovered from any person who passes on inside information, trades on behalf of another, or encourages another to trade.[64] The FSCA will then award such a penalty to persons whom the offending transaction has prejudiced.[65]

5 Monitoring and Enforcement

In South Africa, the FSCA and the JSE are primarily responsible for monitoring and enforcing insider trading regulations. The FSCA is a key player in regulating, supervising, and enforcing rules related to insider trading. The FSCA conducts investigations into suspected cases of insider trading.[66] They can gather evidence, interview persons, and initiate legal actions against offenders.[67] The FSCA is also empowered to enforce insider trading regulations, which include imposing fines and issuing sanctions.[68] It also ensures compliance with securities laws and regulations covering insider trading.[69] Like the JSE ,the FSCA also engages in market surveillance to detect suspicious trading activities that may indicate potential insider trading.[70]

The JSE also plays a significant role in monitoring and enforcing insider trading regulations in South Africa. The JSE establishes and maintains rules and regulations that all listed companies and market

61 See ss 77-78 Financial Markets Act; see Mabina 2019 *Juridical Tribune* 507; Chitimira (LLM) 88; Chitimira "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *JCCLP* 30.
62 See s109 Financial Markets Act.
63 JSE *Insider Trading Booklet (2): Insider Trading and other market abuses (including effective management of price sensitive information)* 2016 6 *27*; see Mabina 2019 *Juridical Tribune* 507.
64 As above.
65 As above.
66 See s 57(a)(c) Financial Sector Regulation Act; Chitimira "Overview of the Available Remedies for Market Abuse under the Financial Markets Act 19 of 2012" 2014 *Mediterranean Journal of Social Sciences* (*MJSS*) 124-135; see also JSE "Market Regulation" 2019. https://www.jse.co.za/regulation/markets-regulation/market-regulation (last accessed 2021-06-28).
67 As above.
68 As above.
69 As above.
70 See s 58 Financial Sector Regulation Act; Davis (2021) 467.

participants must adhere to.[71] The JSE requires market participants to disclose material information about M&A timely.[72] The JSE also operates surveillance systems that continuously monitor trading activities. These systems detect any unusual or suspicious trading patterns that may suggest insider trading.[73] When unusual trading activity has been identified or where material information has not been properly disclosed, the JSE has the authority to suspend trading in that company's securities in question.[74] This action protects investors and prevents further trading until the issue is resolved or clarified. The JSE may also investigate potential insider trading by requesting information or documents and interviewing individuals from the listed companies in question.[75] The JSE may also impose sanctions and penalties on persons found contravening its rules, including those related to insider trading. Furthermore, the JSE may refer cases to the FSCA for further investigation.[76]

It should be noted that the JSE works closely with the FSCA, the primary regulatory body that oversees financial markets in South Africa, in enforcing insider trading regulations. This combination ensures that insider trading, as well as M&A, is actively monitored and regulated within the South African financial markets. The focus is mainly on maintaining market integrity and investor protection.

6 Challenges and Criticisms

The regulation of insider trading in South Africa faces some challenges and criticisms. These are important to consider as they impact the effectiveness and fairness of the legal framework. For instance, there is limited application of insider trading laws in South Africa. The regulation of insider trading only applies to listed companies, excluding unlisted companies.[77] This creates a gap in the regulatory framework where persons may practice insider trading in unlisted securities without any legal repercussions. Insider trading cases can be complex and challenging to investigate and prosecute. Proving insider trading requires demonstrating that the accused had material non-public information and knowingly traded on that information, this can be difficult to prove without sufficient evidence.[78] Furthermore, regulatory authorities such

71 See sched 3.275.2.1 of the JSE Derivatives Rules; JSE "Market Regulation" 2019 https://www.jse.co.za/regulation/markets-regulation/market-regulation (last accessed 2021-11-28).
72 See par 3 of the JSE Listing Requirements; see also JSE *Insider Trading Booklet (2): Insider Trading and other market abuses (including effective management of price sensitive information)* 2016 6.
73 As above.
74 As above.
75 As above.
76 See sched 3.275.2.1 of the JSE Derivatives Rules; see also Olivier *Regulation of Insider Trading in South Africa* (LLM dissertation 2018 University of Pretoria) 40.
77 Chitimira (LLM) 7.
78 See s 78(1)(a) Financial Markets Act.

as the FSCA may have limited resources for enforcement. This raises concerns about their ability to monitor and investigate insider trading activities effectively. Another concern is how time-consuming insider trading investigations and legal proceedings are. This leads to delayed enforcement of regulations and can allow offenders to escape punishment. Market participants and the public may also lack sufficient education and awareness regarding insider trading regulations and the importance of compliance.

Another criticism of the regulation of insider trading in South Africa is that some of the FMA wording lacks specificity regarding insider trading. Words such as "insider trading", "precise", and "specific" in the definition of inside information are not specifically defined, and this leads to statutory interpretation, allowing wider discretion by the judges and leading to arbitrary decision-making.[79] Moreover, it is evident from observing the insider trading regulations in South Africa that the enforcement of the legislation is weak. Since the FMA was enacted, very few insider trading cases have been successfully prosecuted and settled.[80] It can also be noted that there is little cooperation between the FMA, the courts, and the South African Police Service. Weak corporate governance practices within companies may lead to information leaks and a lack of control over insider trading activities.

However, regulators must address these challenges to ensure that insider trading regulations effectively preserve market integrity, protect investors and deter unlawful activities.

7 International Comparison with the United States

The United States was the first country to formally prohibit insider trading in 1934 through the Securities Exchange Act.[81] In its bid to prohibit insider trading, South Africa borrowed some concepts from the approach employed by the United States. For instance, like the United States, the South African FMA does not specifically define insider trading; it lists offences that constitute insider trading.[82] Additionally, the United States regulatory framework requires mandatory disclosure to deter insider trading, protect market participants and maintain integrity in the financial markets. This ensures that material information is disclosed to the public fairly and timely.[83] Mandatory disclosure requirement entails timely disclosure of any material information that could affect the company's share price. Insiders are required to file certain forms such as

79 See s 77 Financial Markets Act.
80 Mmnagitsa 55.
81 Overland *Corporate liability for insider trading* (2019) 2.
82 See s 78 Financial Markets Act.
83 See s 10(b) of the Securities Exchange Act of 1934; see also Rule 10b-5 of the Securities Exchange Commission.

Form 4 and to report their transactions in the company's securities to the Securities and Exchange Commission and any activity amounting to insider trading within two days after conclusion.[84] This is similar to a requirement in South Africa, where market participants must make trading announcements through the Stock Exchange News Service; otherwise, the announcement will not be recognised in terms of the JSE rules.[85] The mandatory disclosure requirement in South Africa requires companies, directors and insiders to disclose any material information and any dealings that might affect the price of their securities within ten days of conclusion.[86]

Nevertheless, it's important to note that there are distinct differences between the legal frameworks governing insider trading in the United States and South Africa. These disparities encompass aspects such as a feature of the regulatory framework of the United States on insider trading, which is the joint effort between the courts and the Securities and Exchange Commission.[87] This feature seems absent in South Africa. There is little cooperation between the courts and the FSCA. This leads to a paucity of successful prosecutions or civil claims, especially in courts.

The collaboration between the FSCA Authority and the courts may be structured so that the FSCA conducts investigations to detect potential insider trading cases, gather evidence and initiate proceedings against persons suspected of engaging in insider trading. FSCA may file civil enforcement actions in court and refer criminal insider trading offences to court. Subsequently, the court may pursue criminal charges against suspected wrongdoers, leading to a trial. Another contrast between the United States and South Africa's regulatory systems is the remedy provided in the Dodd-Frank Wall Street Reform and Consumer Protection Act which allows the Securities and Exchange Commission to pay bounty rewards to whistle-blowers who report insider trading that results in disgorgement of profits, monetary penalties and prejudgment interest exceeding one million dollars in any judicial or administrative proceedings.[88] The bounty rewards may be up to 30% of the penalty imposed.[89] This remedy, in particular, has no equivalent in South African law, and it is suggested that inspiration should be drawn from the United States as this remedy allows for persons involved in insider trading to expose one another in the hopes of being rewarded.

84 See s 16(a) Securities Exchange Act.
85 See par 3.4 of the JSE Listing Requirements; see also JSE *Insider Trading Booklet (2): Insider Trading and other market abuses (including effective management of price sensitive information)* 2016 8; see also Mitchell and Kodongo 2016 *AFJ* 1-19.
86 As above.
87 Chitimira (LLM) 109.
88 See s 922(a) of the Dodd-Frank Protection Act of 2010.
89 See s 21F Securities Exchange Act.; see also Chitimira 2014 *MCSER* 253-262; Palmiter *Securities Regulation: Examples and Explanations* (2005) 370.

8 Conclusion

Insider trading in M&A has proven to be a fertile ground for market abuse practices in South Africa, as there are various gaps that the law has yet to address. This is worrisome as it leaves South Africa vulnerable to market abuse practices and chases away investors who may not have much faith in the fairness and stability of the South African financial markets.

South Africa can consider some best practices to enhance its regulatory framework for insider trading in M&A and to improve market integrity. These practices include, first, strong enforcement and penalties. South Africa can strengthen its enforcement of insider trading regulations by imposing stricter fines and penalties on insider trading offenders. This serves as a strong deterrent. Second, enhancing whistleblower protection and incentive programs can encourage individuals with insider trading knowledge to come forward. Third, providing clear and consistent guidance to market participants through well-defined legal frameworks for insider trading. Clarity in the rules helps prevent confusion and promotes compliance. Fourth, protecting minority shareholders ensures that information about M&A is disseminated fairly and equitably. Fifth, South Africa needs to promote cooperative enforcement agreements between the FSCA courts, JSE, and the International Organisation of Securities Commissions (IOSCO). By adopting some of these practices, South Africa can directly address insider trading in M&A in its regulatory framework. Clear and consistent guidance for market participants through well-defined legal and regulatory frameworks. Clarity helps prevent confusion and promotes compliance. South Africa may also be urged to invest in advanced market surveillance technology to monitor trading activities in mergers and acquisitions. This is not an indictment of the current framework being implemented in South Africa. Still, it is a firm assertion that more can be done to combat insider trading in M&A.